PREME COURT U.S.
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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. 313

DONALD KALISH,

Petitioner,

vs.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth District.

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Petitioner hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The opinion of the Court of Appeals [Tr. Vol. 1, portion added by Court of Appeals] is included herein, at pages 8-9 of the appendix, *infra.* It is not yet reported. The complaint, defendant's motion to dismiss the complaint, and the order of dismissal of the complaint with prejudice [Tr. Vol. 1, pp. 2-6, 8, 37-8], are also shown in the appendix, *infra,* at pp. 1-7 thereof.

Jurisdiction.

The judgment of the Court of Appeals was entered April 23, 1969 (App. p. 8). The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

Questions Presented.

Preliminary Statement.

This case involves a claim by petitioner for refund of federal excise tax on telephone service. Petitioner based his claim for refund on the contention that the act imposing the amount for which refund was sought by him was invalid, and that the reason the act was invalid was that the revenue to be raised by it was intended, in the enactment of the act, solely for a purpose violative of the Constitution. The judgment sought by petitioner was solely one for refund of the sum paid by him.

The court below did not reach the constitutional issues and expressly said so. It decided only that petitioner did not have the required standing to sue. Also, although nothing on the face of the statute, as the court below found, revealed the purpose for which the revenue to be raised by the act was intended, the court declined to go outside the face of the act to determine that purpose. It did this, it appears, in connection with the question of standing to sue, in order to show what it believed to be an absence of required nexus between petitioner's status and a limitation under the Constitution.

Question Presented.

For the purpose of this petition we limit ourselves to the question decided by the court below, that is, as above shown, whether petitioner did or did not have the required standing to sue. We think it an unnecessary burden on this Court to consider at this point questions presented to the court below but which it expressly held it did not reach. The cause could be remanded to

that court for consideration of those questions. *Peoria Tribe of Oklahoma v. U.S.*, 390 U.S. 468, 473, 88A S. Ct. 1137, 1139.

Statutes Involved.

The relevant jurisdiction of the District Court is contained in 28 U.S.C. §1346(a)(1). The provision governing procedure on a suit for refund of federal taxes, to the extent relevant here, is I.R.C. 1954, §§7422(a), (b). The act imposing the tax involved is Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38. We do not quote those provisions, however, because no question as to their wording or meaning is presented by this proceeding.

Statement.

Necessarily this statement repeats in part the Preliminary Statement under the heading of Questions Presented.

The suit here is for refund of federal excise tax on telephone service. Petitioner filed the required claim for refund. Respondent denied the claim. The filing of this suit in the District Court followed.

Respondent did not file an answer but instead a motion for dismissal on the following grounds:

1. That petitioner lacked standing to sue;
2. That the court lacked jurisdiction because the issue was a political one; and
3. That the complaint failed to set forth a claim upon which relief could be granted.

The District Court, reciting the grounds of the motion as above, granted it (App. p. 7). Appeal to the court below followed. That court affirmed, on the basis

solely of the first ground above stated, lack of standing to sue.

The complaint (App. pp. 1-5) alleged that appellant paid the sum of $6.15 as federal excise tax on telephone service for the month of August 1967; and that of that amount the sum herein sued for, $4.92, represented the additional amount of such tax imposed under the Tax Adjustment Act of 1966. The complaint further alleged that the additional amount so imposed was imposed, as stated in the claim for refund, for the sole purpose of providing funds for the war in Vietnam; and that the use of the funds so intended was, as also stated in the claim for refund, in violation of the Constitution of the United States. The complaint also, under paragraph X thereof, alleged several facts as reasons why such use of the funds to be raised by the tax was in violation of the Constitution of the United States.

In general, as presented to the court below, those facts involve several constitutional limitations on the power of Congress, including the separation of powers, the law of nations, and the First Amendment. But we omit them here because of the limitation of the Questions Presented to the one question of standing to sue.

Reasons for Granting the Writ.

1. The decision below is contrary to the decision of this Court on which it chiefly relies, *Flast v. Cohen*, 392 U.S. 83. As observed in *Flast*, at pages 99-100:

> ". . . when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

In that case this Court had before it not a suit for refund of tax paid but a proceeding to enjoin certain spending of government monies. A suit for refund of tax paid, however, is expressly authorized by statute. And who else but the person who paid the tax could bring such a suit?

Indeed, even in a dissent in *Flast,* disputing the standing to sue found by the majority there, the dissenting justice nevertheless conceded, at page 117:

> "It could hardly be disputed that federal taxpayers may, as taxpayers, contest the constitutionality of tax obligations imposed severally upon them by federal statute. . . . Moreover, such a challenge may provide the basis of an action by a taxpayer to obtain the refund of a previous tax payment. See, e.g., Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817."

In *Bailey* the taxpayer, as indicated, paid the tax, filed claim for refund, and on its rejection brought suit.

Clearly, the decision below is not only not supported by *Flast,* but is in conflict with it and the other cases cited above.

2. The decision below is in conflict with another decision of this Court on which it attempts to rely, *United States v. O'Brien,* 391 U.S. 367.

As stated by this Court in *Cincinnati Soap Co. v. U.S.,* 301 U.S. 308, 312-313, a tax is invalid if the purpose of the tax is not within the power of Congress under the Constitution; and as stated in *A. Magnano v. Hamilton,* 292 U.S. 40, 43, the requirement as to purpose "has regard to the use which is to be made of the revenue derived from the tax, and not to any ulterior

motive or purpose which may have influenced the legislature in passing the act."

Here, in order to show the purpose of the tax—its *sole* purpose—petitioner relied below entirely on the House and Senate committee reports which presented the bill for the tax to Congress. This was the only possible method of showing its purpose since, as the Court below conceded, nothing on the face of the act revealed it. And this is exactly what this Court did to show the purpose of the act in *United States v. O'Brien, supra,* at pages 385-6. Indeed, this Court there included in its opinion, as an appendix, the entire portions of the Senate and House committee reports explaining the section of the act there involved. Here petitioner in presenting the case to the court below did precisely the same thing. The portion of the reports so presented there are included in the appendix herein, pages 10-11.

Thus, the decision below is not only not supported by *United States v. O'Brien, supra;* it is directly in conflict with it.

3. The importance of the issue is of the greatest. It begs the question of standing to sue to inject it into a suit of a person, solely for refund of taxes imposed upon him, and paid by him, where precisely such suit by such person is expressly authorized by statute. The decision below will cause no end of confusion in tax litigation. It must not be allowed to stand.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

APPENDIX.

Complaint in Suit for Refund of Federal Excise Taxes.

United States District Court, Central District of California.

Donald Kalish, Plaintiff, vs. United States, Defendant. No. 68-128-F.

Filed: Jan. 26, 1968.

Plaintiff brings this suit under Judicial Code, 28 U.S.C. §1346, for refund of federal excise taxes, together with interest on the amount paid as allowed by law, and alleges as follows:

I

Plaintiff is an individual residing at 15142 Mulholland Drive, Los Angeles, California 90024, and his social security number is 491-14-8069.

II

On September 14, 1967, plaintiff paid to General Telephone Company as collecting agency, pursuant to a bill of that agency dated September 10, 1967, the sum of $6.15 as federal excise tax on telephone service for the month of August 1967; and on September 20, 1967, the said collecting agency paid over the said sum to defendant.

III

No refund of said amount, in whole or in part, has been made by the said collecting agency to plaintiff; nor has plaintiff consented to allowance of refund of said amount, in whole or in part, to that agency.

IV

Of said sum of $6.15, the amount of $4.92 was specified, pursuant to a letter enclosed by plaintiff with the payment, as covering the sum herein sued for.

V

On September 21, 1967, plaintiff filed with defendant claim for refund of said sum of $4.92, stating the grounds of his claim as follows:

> "Of the amount of tax paid, $6.15, $1.23 constitutes the amount payable under P. L. 89-44, the Excise Tax Reduction Act of 1965. The balance, $4.92, constitutes the additional amount imposed under P. L. 89-368, the Tax Adjustment Act of 1966. That additional amount is the amount herein claimed.
>
> "Under P. L. 89-44, the rate of tax for the period herein involved would have been 2%; by P. L. 368 an earlier 10% rate was reinstated. As expressly shown by the House and Senate committee reports, U. S. Code Congressional and Administrative News, 89th Congress, Second Session, Vol. 2 (Legislative History), pages 1933, 1935, 1937, 1938, 1963, 1964, 1985, 1990, 2010, 2011, the sole purpose of the reinstatement of the 10% tax rate was to provide funds for the war in Vietnam. As there clearly and expressly shown, if that war were not in process none of the funds provided by P. L. 89-368 would be necessary.
>
> "It is my view that the action of the Government in carrying on the said war is in violation of the Constitution of the United States. I take the posi-

tion, therefore, that the excise tax on telephone service, to the extent of the 8% added by P. L. 89-368, is completely void."

VI

On January 18, 1968, the United States Treasury Department, by its Internal Revenue Service Center, Western Region, 1160 West 1200 South, Ogden, Utah 84405, issued to plaintiff a letter denying said claim, said letter bearing as reference symbols the following: "53212: :vs."

VII

The said letter stated as the grounds for denying said claim the following:

"The authority of the Internal Revenue Service to make credits or refunds, as set forth in Section 6402 of the Internal Revenue Code of 1954, is limited to overpayments of taxes. There is no provision of law under which the Service is authorized to make refunds based on the grounds set forth in your claim."

VIII

The additional tax of which the sum of $4.92 herein claimed was a part was imposed, as stated in the said claim for refund thereof, for the sole purpose of providing funds for the war in Vietnam.

IX

The action of the Government in carrying on the said war is, as stated in the said claim for refund, in violation of the Constitution of the United States.

X

Among the reasons why the action of the Government in carrying on the said war is in violation of the Constitution of the United States, plaintiff cites and alleges the following:

(a) The purpose of said war is not, and never was, the common defense or general welfare of the United States, but the defense of private enterprise, and the profit, growth and expansion thereof, within the United States and everywhere else on this planet, against the barrier and progress in foreign nations, wherever they may be, of a political and economic system and ideology foreign to and restrictive of private enterprise.

(b) The said war was never declared by Congress, as the Constitution requires, and it could not have been declared by Congress, because Congress, in view, among other factors, of the said purpose of said war, could not have identified, and never did identify, in the origin of said war or later, the nation or nations against which it was to be carried on.

(c) There never was an attack upon the United States or any of its facilities by any of the areas or people against which the said war is being carried on.

(d) The said war is in conflict with the United Nations Charter, the so-called SEATO Treaty, and other treaty obligations of the United States.

(e) The acts by American forces in said war include the use of devices and methods, such as, among others, napalm and fragmentation bombs, of such a degree of obscene cruelty and brutality, against not only armed forces but unarmed civilians, and against not only

adults but children and even infants, that they violate the law of war included in the law of nations recognized by the Constitution.

XI

The facts alleged in paragraph X above are of such common knowledge as to be within the scope of judicial notice.

WHEREFORE, plaintiff prays for judgment in his favor as follows: refund of tax in the amount of $4.92, plus interest thereon as allowed by law, together with his costs and disbursements herein.

/s/ George T. Altman
George T. Altman
Attorney for Plaintiff

Defendant's Motion to Dismiss Complaint.

In the United States District Court for the Central District of California.

Donald Kalish, Plaintiff, v. United States, Defendant. Civ. No. 68-128-F.

Comes now the defendant, UNITED STATES OF AMERICA, and moves to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted, for the reasons set forth in the defendant's memorandum of points and authorities attached hereto.

WM. MATTHEW BYRNE, JR.
United States Attorney

LOYAL E. KEIR
Assistant United States Attorney
Chief, Tax Division

By: /s/ Loyal E. Keir

Order of Dismissal of Complaint With Prejudice.

United States District Court, Central District of California.

Donald Kalish, Plaintiff, v. United States of America, Defendant. No. 68-128-F Civil.

Lodged: April 23, 1968.

Filed: April 24, 1968.

Entered: April 24, 1968.

The United States of America, defendant herein, having filed a motion to dismiss the complaint in the above-entitled proceeding on the three-fold grounds that: (1) Plaintiff has no standing to sue, (2) this Court lacks jurisdiction to determine the issue raised by the complaint since the issue is a political one, and (3) the complaint does not set forth a claim upon which relief can be granted; and

The said motion having come on for hearing before this Court on April 22, 1968, at Los Angeles, California; and

The Court having examined the memoranda filed by the parties, heard arguments of counsel, and otherwise considered the matter;

IT IS HEREBY ORDERED THAT:

The defendant's motion to dismiss the complaint is granted, and the complaint is hereby dismissed with prejudice, each party to bear its own costs.

DATED: April 24, 1968.

Warren J. Ferguson
United States District Judge

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Donald Kalish, Appellant, vs. United States of America, Appellee. No. 22,886.

[April 23, 1969]

Appeal from the United States District Court for the Central District of California.

Before: Barnes and Hufstedler, Circuit Judges, and Solomon,* District Judge.

PER CURIAM:

We affirm the action of the district court in granting appellee's motion to dismiss.

This case involves a claim for refund of Federal Excise Tax in the amount of $4.92 paid by the appellant for telephone service, because he claims that the taxing statute (Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38, 66, § 202(a)) is unconstitutional in that Congress was motivated to enact the statute to raise funds for use in the Vietnamese war effort. From that platform appellant launches an attack on the constitutionality of the Vietnam war. We do not reach the constitutional questions, because appellant cannot thus raise them. (*Cf. Flast v. Cohen*, 392 U.S. 83 (1968).) He has established the first nexus required (a taxpayer attacking a federal spending program) but not the second required nexus, because there was no allegation that

*Hon. Gus J. Solomon, Chief Judge, United States District Court, Portland, Oregon, sitting by designation.

Congress, in enacting the Tax Adjustment Act of 1966, "had breached a specific limitation upon its taxing and spending power." *Id.* at 104-105. Hence, appellant had no standing to sue.

Nothing on the face of the statute states the purpose for which the revenue will be used. It is merely a general excise tax statute. We will not probe the legislative history to unearth a claimed improper motive in the enactment of a statute to overturn an otherwise valid statute. (*United States v. O'Brien, supra.*) *See also: Luftig v. McNamara,* 373 F.2d 664 (D.C. Cir. 1967); *United States v. Hogans,* 369 F. 2d 359, 360 (2d Cir. 1966).

Excerpts From Reports of House and Senate Committees, 89th Congress, 2nd Session, 1966, on H.R. 12752, Which Became Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38, Being Excerpts Quoted From U.S. Code Congressional and Administrative News for That Session, pp. 1937-38 (House) and 1990 (Senate).

(The Two Reports Are Identical Except for Typographical Changes Made by the Senate, Which Appear Below in Italics, Any House Wording Replaced or Omitted Appearing in Brackets).

The tax adjustment bill of 1966 will help provide the additional revenues which your committee is advised will be required by the conflict in Vietnam. This bill is designed to help finance the additional expenditures required for this purpose without generating serious inflationary pressures in the domestic economy. The additional revenues will be derived from two general types of provisions. The first consists of improvements in tax collection procedures which, without affecting tax liabilities, involve a temporary increase in the amount of revenues by making payments more current. The remaining provisions restore *excise* rates in effect on December 31, 1965, and impose a 2-year moratorium on presently scheduled reductions in the excise taxes on passenger automobiles and telephone service.

Were it not for special Vietnam costs, [administration testimony before your committee has informed us,] *your committee has been informed* the increase in Federal revenue attributable to the growth of the economy —growth largely in response to the tax reductions enacted in recent years—would be sufficient not only to meet the regular requirements of Federal operations but also to provide a surplus. The President's budget mes-

sage indicates that special Vietnam expenses will account for an estimated $10.5 billion of administrative budget expenditures for the fiscal year 1967. These expenses account for $5.8 billion of the $6.4 billion increase in expenditures in the fiscal year 1967 over those for the fiscal year 1966. It is estimated that revenues would increase by [$7.5] *$7.3* billion between the 2 fiscal years if no change were made in existing tax laws, an amount that would be sufficient to produce a substantial budget surplus were it not for the extraordinary defense requirements. It will be recalled that when the [House] *Senate* was considering [what became] the Revenue Act of 1964—which provided a reduction of $11.5 billion, the largest reduction ever provided—the then Secretary of the Treasury Douglas Dillon indicated that despite this reduction, it might be possible to balance the budget in the fiscal year 1967. It should be noted that this objective of a balanced budget in the fiscal year 1967 would be obtained were it not for the extraordinary defense expenditures arising from the conflict in Vietnam. Thus, were it not for the special Vietnam expenses of $10.5 billion, there would be no need at this time for the 2-year excise tax reduction moratorium or for an advancement of the corporate tax payments at a more rapid rate than originally planned.